STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN T. SCHMITZ,

Defendant-Appellant.

UNPUBLISHED
January 22, 2002

No. 222834
Oakland Circuit Court
LC No. 95-138448-FC

Before: Saad, P.J., and Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced defendant to twenty-five to fifty years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in precluding evidence of his history of alcoholism and suicide attempts. We disagree. The decision to admit evidence is within the trial court's discretion and should only be reversed if there is a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, the decision whether to admit evidence frequently involves a preliminary issue of law, which is reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Defendant argues that his history of alcoholism and suicide attempts was relevant to his theory of the case, namely, that he was guilty of voluntary manslaughter rather than second-degree murder, because his conduct was sufficiently provoked to mitigate his culpability. Murder and voluntary manslaughter share the element of being intentional killings; it is

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[1] Defendant was originally charged with first-degree premeditated murder, MCL 750.316, and felony-firearm. At a jury trial held in October 1996, defendant was convicted of the lesser included offense of second-degree murder and felony-firearm. Defendant was sentenced to twenty-five to fifty years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction. Defendant appealed as of right from these convictions and sentences. This Court reversed defendant's convictions on the basis of an erroneous jury selection process and remanded the case for a new trial. *People v Schmitz*, 231 Mich App 521; 586 NW2d 766 (1998). The charges were then amended to include second-degree murder.

provocation that separates the two crimes. *People v Hess,* 214 Mich App 33, 38; 543 NW2d 332 (1995). "Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation, and before a reasonable time has passed for the blood to cool and reason to resume its habitual control." *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993). The provocation necessary to mitigate a homicide from murder to manslaughter is that which would cause the defendant to act out of passion rather than reason. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Provocation is adequate only if it would provoke a *reasonable* man to commit the act. *Id.*

In this case, defendant argues that evidence of his history of alcoholism and suicide attempts is relevant to show the extent to which he was provoked. Therefore, the issue before this Court is whether the trial court abused its discretion in precluding evidence of defendant's alcoholism and suicide attempts based on lack of relevance to the issue of provocation. The trial court did not abuse its discretion because the evidence is not relevant. This Court has specifically held that "any special traits of the particular defendant cannot be considered. The fact that defendant may have had some mental disturbance is not relevant to the question of provocation." *Id.* at 519-520. Defendant concedes this point of law, and further acknowledges that the evidence presented at trial showed that defendant did not drink prior to the taping of the Jenny Jones talk show, but began drinking heavily after the show. Nonetheless, defendant argues that further evidence of defendant's history of suicide attempts and alcoholism was relevant to show how deeply defendant was disturbed by what happened on the show. However, defendant's history of alcoholism and suicide attempts would likely have been more prejudicial and confusing than probative. See MRE 403. The evidence presented at trial served adequately to support defendant's theory. The fact that defendant may have experienced mental fragility in the past may have enhanced defendant's theory slightly, but it was also likely to engender sympathy with the jury or cause confusion about the "reasonable person" standard. See *Sullivan*, *supra* at 518. The trial court did not clearly abuse its discretion in ruling that this evidence was inadmissible.

Defendant next argues that his twenty-five to fifty year sentence for second-degree murder violates the principle of proportionality, which requires that the sentence imposed by the trial court be proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree.

A trial court's imposition of sentence is reviewed for an abuse of discretion. *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999). Given the calculated manner in which defendant carried out the murder of Scott Amedure, we find no abuse of discretion in the sentence imposed. In any event, defendant's minimum sentence falls within the recommended guidelines' range of eight to twenty-five years and is thus presumptively proportionate. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). Although a sentence within the guidelines' range can conceivably violate proportionality in "unusual circumstances," *Milbourn*, *supra* at 661, the factors cited by defendant on appeal, i.e., his lack of any history of criminal behavior and the fact that his minimum sentence represents the upper-end of the

guidelines' range, are not unusual circumstances that would overcome that presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). See also *People v Granderson*, 212 Mich App 673, 681; 538 NW2d 471 (1995).

We affirm.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck